



IN THE ENVIRONMENT & LAND COURT AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 539 OF 2011

CHRISTOPHER IRUNGU NGUGI.....PLAINTIFF

-VERSUS-

PAUL MURIUKI1ST DEFENDANT

EMBAKASI RANCHING CO. LTD.....2ND DEFENDANT

JUDGEMENT

By a Plaint dated the 7th October 2011 the Plaintiff prays for judgement against the Defendants for following orders:-

- a) A declaration that the Plaintiff is the lawful owner of all those plot numbers G520B-Nairobi/Block 136/2290 and G520-Nairobi/Block 136/2291.
- b) A declaration that the 1st Defendant is a trespasser on the said plots.
- c) An order of mandatory injunction be issued against the 1st Defendant ordering him not to enter and/or remain on the Plaintiffs' said plots by himself or its agents/employees
- d) A permanent injunction restraining the 2nd Defendant from transferring the Plaintiff's said plots to the 1st Defendant or anybody else other than the Plaintiff.
- e) That the 2nd Defendant's do all that is necessary to have the said two plots transferred unto the name of the Plaintiff in the land registry and in default the registrar of the court be authorized to execute all necessary documents to vest title into the plaintiff's name if need be.
- f) THAT in event of the two plots having been transferred or being transferred to the 1st Defendant by the 2nd Defendant before the filing of the suit or in course of the proceeding fraudulently the register be rectified by deleting the name of the 1st Defendant and substituting the name of the Plaintiff in lieu thereof.
- g) That costs of this suit be awarded to the Plaintiff.

The 1st Defendant filed his Defense where he avers that in the year 1992, he bought 2 shares, comprised of two quarter acre plots, within the 2nd Defendant's farm at Ruai, Embakasi Area, Nairobi from two different sellers. He confirms that he bought one share from Peter Mbutia Njoroge the bonafide owner of one (1) share under share certificate no. 4602, specifically comprised in plot no. P5806, which was duly transferred to him by the 2nd Defendant, upon completion of the transaction. Further, that he bought the 2nd share from one Gideon Wachira Njuguna, the bonafide owner of the ¼ acre share under share certificate no. 8163 comprised in plot no. P5807, which was duly transferred to him by the 2nd Defendant upon completion of the transaction. He contends that upon completion of the two separate sales, the transfers were effected by the 2nd Defendant to him and he was duly issued with share certificate no. 14451 dated 2nd November, 1992. He insists that after the transaction was completed he took actual possession of the suit plots in November 1999, and immediately put up a home where he has lived continuously with his family to date. He reaffirms the identities of the suit plots and contends that the Plaintiff failed to claim ownership of the same since in the year 2004, when he claims to have bought them, he was already in actual occupation. He reiterates that the 2nd Defendant has, through its surveyors, after this dispute arose, reconfirmed that he is the bonafide owner of the suit plots and the Plaintiff has no proprietary right over them.

The 2nd Defendant filed its Defence and avers that in the year 1992, the 1st Defendant bought 2 shares, comprised of two-acre plots, within the 2nd Defendant's farm at Ruai, Embakasi Area, Nairobi from two sellers. It confirms that the 2nd Defendant bought one share from Peter

Mbuthia Njoroge the bonafide owner of one (1) share under share certificate no. 4602, specifically comprised in plot no. P5806, which was duly transferred to him by the 2nd Defendant, upon completion of the sale. He further confirms that the 1st Defendant bought the 2nd share from one Gideon Wachira Njuguna, the bonafide owner of the ¼ acre under share certificate no. 8163, comprised in plot no. P 5807, which was duly transferred to the 1st Defendant by the 2nd Defendant upon completion of the transaction. It explains that when the two separate sales were completed, and the transfers were effected to the 1st Defendant, he was duly issued with share certificate no. 14451 dated 2nd November, 1992 for both shares. It contends that the 1st Defendant thereafter took possession of the suit plots in November 1999 and immediately put up a home where he has lived continuously with his family to date. It further confirm the 1st Defendant is the bonafide owner of the two plots and not the Plaintiff. It contends that through its surveyors, it reconfirmed after the dispute arose that the identity of the suit properties are plots P5806 and P5807 respectively. Further that the 1st defendant is the bonafide owner of the said properties and the plaintiff has no proprietary claim or right over them.

The matter proceeded for hearing with the Plaintiff calling one witness while the Defendants had two witnesses.

Evidence of the Plaintiff

The Plaintiff as PW1 claims to own the disputed plots which the 1st Defendant had trespassed upon and put up structures thereon. It was his testimony that he acquired the said parcels **EMBAKASI G520 & G520B in 2004** after being transferred to two shares from MARGARET NJERI MWAURA alias MARGARET NJERI KARONGO being land parcels NRB BLOCK 136/2290 & NRB BLOCK 136/2291 respectively. Further, upon discovery of the said development, he decided to visit the 2nd Defendant's offices and on arrival he found the surveyor by the name JOHN KANOTHA who informed him that the plots had changed ownership. He confirmed in his testimony that in the course of pursuing his plots, he discovered that the map used to allocate plots G520 and G520 B had been altered and replaced with plot numbers P5806 and P5807 respectively but the parcel numbers remain the same as his. Further, that the original documents which were given to him by the 2nd Defendant got lost in the office of his advocate Kamonde who passed away but he reported the loss to the Police that issued him with an Abstract. He claimed to be a shareholder but never attended any meetings as he has never been invited.

During cross examination PW1 confirmed to court that he had been in occupation of the Suit Plots since the year 1991. That it is the 2nd Defendant who was tasked with the plot allocation and that the map used was with the Director of Surveys at Ruaraka Nairobi. He produced various documents as exhibits including a Copy of Share Certificate in favour of MARY NJERI MWAURA dated 1/08/1978 (Pex No. 1); Receipt No. 5162 dated 2/4/1982 for Ksh. 500/= in favour of MARY NJERI MWAURA (Pex No. 2); Receipt No. 1768 dated 3/9/1993 for Kshs. 6,000/= (Pex No. 3); Receipt No. 7034 for Kshs. 3,500/= (Pex No. 4); Receipt No. 9015, Engineering Receipt, Survey Receipt, Copies of ID and Police Abstract (Pex No. 5 (a) (b) (c) (d) & (e) respectively; Copy of Shares as stock dated 26/10/2004 for the whole share Certificate (Pex No. 6); Receipt No. 025784 dated 15/2/2011 for Kshs. 5,000/= for site visit (Pex No. 7); Certificate No. 2040 dated 31/10/2008 (Pex No. 8); Survey Map for Plot Number NRB/BLOCK 136/2290 & 2291 respectively (Pex No. 9); Plaintiff's letter dated 11/5/2011 (Pex No. 12) and a copy of the Advocate's letter dated 30/6/2011 (Pex No. 12) and a Copy of the Share Certificate with Allocation dates behind it and marked as (Pex No. 13) to support his case.

Evidence of the Defendants

The Defendants called 2 (two) witnesses who were DW1, the 1st defendant; PAUL WAIGIRI MURIUKI and DW 2, the 2nd defendant's Surveyor; Mr. JOHN KANOTHA.

DW 1; PAUL WAIGIRI MURIUKI testified that in 1992, he purchased two (2) shares of property belonging to the 2nd defendant and that one (1) share is one (1) plot each measuring ¼ an acre and in total he bought ½ an acre of land. It was his testimony that the two (2) plots are; PLOT NO. 5806 & PLOT NO. 5807 and that the allocation was done directly by the 2nd Defendant's Surveyor; DW 2; JOHN KANOTHA whereupon in the year 1994, he took possession, fenced and planted trees. Further, that in September 1998 he built a semi-permanent building and moved to the plot in January 1999. It is his testimony that in the year 2004 he embarked on building his main house where he currently resides. DW1 explained that he personally knew the Plaintiff and that they have worked for the same employer. DW 1 narrated how he acquired his plot i.e. PLOT NOS. NRB/BLOCK 136/2290 & NRB/BLOCK 136/2291 respectively and which Plots are different from the Plaintiff's Plots. He insisted that he acquired them after conducting a site visit and depositing a site visit fee of Kshs. 5,000/= by then and which fee now stands at Kshs. 20,000/= and was shown his Plots by the 2nd Defendant's Surveyor.

In cross examination he confirmed having attended meetings with the 2nd defendant's officials as a member but did not produce any documentation to that effect. He denied that PLOTS NOS. G520 & G520B were fraudulently and illegally transferred and converted into PLOTS Nos. P5806 & P5807 respectively. DW1 produced various documents including Share certificate number 14451 by Embakasi Ranching Company Limited to Paul Waigiri Muriuki dated 2nd November 1992; Bundle of receipts for plots Numbers P5806 and P5807 from Embakasi Ranching Company Limited to Paul Waigiri Muriuki; Agreement for Sale dated 23rd November 1992 of one share under certificate number 4602 (Embakasi Ranching Company Limited) dated 1st August 1978 – Peter Mbuthia Njoroge to Paul Waigiri Muriuki; Agreement for Sale dated 5th November 1992 of one (1) share under share certificate number 8163 (Embakasi Ranching Company Limited) dated 31st December 1978 – Joseph Mahiuha Njuguna to Paul Waigiri Muriuki; Receipt Numbers 026221 for site visit fees for plot numbers P5806 and P5807 dated 3rd March 2011- (Embakasi Ranching Company Limited) to Paul Waigiri Muriuki; Letter by the District Officer, Njiru District dated 23rd May 2011 to John Muhia Kanotha.; A bundle of photographs of the suit properties showing the permanent residence of the 1st defendant taken on 7th November 2011 to support his case.

DW2 JOHN KANOTHA was the 2nd Defendant's surveyor. He confirmed having been a surveyor since 1978 and worked with the 2nd defendant for 41 years. He explained that his roles included undertaking subdivision of land, showing of beacons, verification of documents e.g. Land Certificate, following up on registration of survey documents and approvals for subdivision. He knew the Plaintiff as he had held meeting with him at the 2nd Defendant's office. It was his contention that his role only involved interpreting the map for the Plaintiff and the 1st Defendant. He was aware of the dispute between the Plaintiff and the 1st Defendant and confirmed that the 1st Defendant had built on the

land. Further, that he undertook site visits and averred that the Plaintiff's documents were genuine. He insisted that the Plaintiff was to follow up with the 2nd Defendant's board to show him the plots he was allocated upon payment of Kshs. 20,000 as site visit fees.

In cross-examination DW2 confirmed that there was a dispute between the Plaintiff and the 1st Defendant. He confirmed Plaintiff was owner of PLOTS Nos. G520 & G520B. He produced a map from the 2nd Defendant as an exhibit.

It was his testimony that he gave the site visit report to the 2nd Defendant's board for action.

All the parties filed their submissions that I have considered.

Analysis and Determination

Upon consideration of the materials presented in respect of the suit herein including witness testimonies and parties submissions, the following are the issues for determination:

- i) Whether the Plaintiff is the lawful owner of PLOTS NO. G520 & G520B with new registration Numbers being NAIROBI BLOCK 136/2290 and 136/2291 respectively.
- ii) Whether the 1st Defendant illegally acquired the Plaintiff's plots
- iii) Whether the Plaintiff is entitled to the orders sought
- iv) Who should bear the costs of the suit.

As to whether the Plaintiff is the lawful owner of PLOTS NO. G520 & G520B with new registration Numbers being NAIROBI BLOCK 136/2290 and NAIROBI BLOCK 136/2291 respectively. The Plaintiff contended that he is the owner of the suit plots and produced documents to support his arguments. He claims to have purchased the suit plots G520 and G20B from one Margaret Njeri Mwaura alias Margaret Njeri Karongo respectively. The Plaintiff, however, did not bring the vendors to court to testify on his behalf. He claimed to have been shown the plots by the 2nd Defendant's Surveyor and he knew the location of the plots from a map he was given by one of the shareholders who is since deceased. PW1 testified that the documents issued to him by the 2nd Defendant got lost and that the map they had used to allocate him his plots was also altered. The 1st Defendant claims he purchased two plots and was later issued with Share Certificate No. 14451 by the 2nd Defendant. He contends that he has been in occupation of the suit plots after purchase. The parcel numbers of the two plots are Nairobi/Block136/2290 and Nairobi/Block /2291. Both the plaintiff and the 1st defendant have been claiming proprietary interest in the suit plots.

The evidence of the 1st Defendant was corroborated by the 2nd Defendant's witness who is the Surveyor. DW2 in his testimony contended that for a party to claim a plot he had to pay survey fees at the 2nd Defendant's office after which he would be shown the plot.

PW1 in his testimony explained that the plots were indicated in the allocation map by the surveyors of the 2nd Defendant. On cross examination, it emerged that he did not have the corresponding parcel numbers of the plots from the Director of Surveys. PW1 further stated that after purchase of his two plots, he was shown the actual site in 2004 by the surveyors of the 2nd defendant, after payment of the site visit fees. DW1 on the other hand claimed to have been in continuous possession and occupation of the suit plots since 1999. He insisted that the 1st Defendant was a bonafide purchaser for value and had no proprietary interest in plot numbers G520 and G520B, as he owned plot numbers P5806 and P5807 which are now identified as LR NAIROBI/BLOCK 136/2290 and 221, respectively. DW1 insisted that the real identities of the suit plot are numbers P5806 and P5807 and not G520 and G520B as claimed by the Plaintiff. It emerged in court that both the Plaintiff and the 1st Defendant knew each other and had met at the suit plots when the 1st Defendant was already in occupation thereon. I find this curious because if indeed the 1st Defendant has been in occupation thereon from 1999 with the Plaintiff purchasing his plots in 2004, why did the Plaintiff not protest when the 1st Defendant commenced construction thereon. DW2 that represented the 2nd Defendant who is the allocating authority insisted that the Plaintiff should proceed to the 2nd Defendant's office to be allocated his parcel of land. According to the testimony of DW2 from both the allocation and the survey map, the bonafide owner of the suit plots is the 1st Defendant. He doubted the Plaintiff's share certificates and wondered how the same could have been signed by two surveyors. According to him, the real identities of the suit properties is plot number P5806 and P5807, with corresponding parcel numbers of LR Nairobi/Block 136/2290 and 2291, respectively.

He testified that the 2nd defendant, as the allocating authority, had attempted to resolve the dispute between the Plaintiff and 1st defendant before it was brought to court. It resolved in favour of the 1st Defendant. DW2 confirmed that the 2nd defendant was also ready and willing to assist the plaintiff access his plots. However, the plaintiff did not cooperate with the 2nd defendant and instead decided to come to court.

DW2 stated that when he visited the suit plots in 2009, it was the 1st Defendant in possession. He further challenged the map the Plaintiff had obtained from one of the Shareholders. He was categorical that the Plaintiff should visit the offices of the 2nd Defendant so as to be shown his plots once he pays Kshs. 20,000/= site visit fees.

In the case of **Mwangi & Another Vs Mwangi KLR 328 quoted in Henry Muthee Kathurima Vs Commissioner of Lands & Another (2015) eKLR** the court held that the rights of a person in possession or occupation of land have equitable rights which are binding on the land.

Further in the case of Mathew Ndaui Kiambati v James Gichuki Magondi & another [2018] eKLR Justice Okongo while dealing with dismissing an Appeal dealing with facts similar as this suit held that, ‘ **I am in agreement with the Appellant that the 1st Respondent had the burden of proof. I am satisfied that the 1st Respondent discharged this burden on a balance of probabilities. He proved that he was the owner of the suit properties and that he was in possession of the same. He also proved that he had fenced the properties and that the Appellant had destroyed a portion of his fence and had threatened to bring down the whole fence. The Appellant has contended that the lower court ignored the corroborative evidence of Jack K. Wachira (DW2). I have already commented on the evidence of this witness. In my view the evidence of this witness was not helpful at all to the Appellant. A part from confirming a fact that was not in dispute that the Appellant was allocated the Appellants’ properties, DW2 placed nothing more of value before the court on the dispute. The Appellant has amplified DW2’s statement that “the plots are the same on the ground” to mean that the Appellant’s properties as they appeared on the map that DW2 produced were as they were on the ground. The issue that the witness did not answer was, which ground? DW 2 did not answer this critical question which only he could answer. I find the case of Gitwany Investments Ltd. vs. Jajmal Limited and others (2006)2 E.A 76(HCK) that was cited by the appellant distinguishable. That was a case of double allocation of land. As I have mentioned earlier in this judgment the dispute here was not about double allocation of land but the physical location of the various parcels of land claimed by the Appellant and the 1st Respondent.’**

In the current case, the burden of proof was upon the Plaintiff to prove the 1st Defendant unlawfully took his land and constructed thereon. However, based on my analysis as well as associating myself with the two decisions cited above, I have no reason to doubt that the 1st Defendant is indeed the bona fide owner of the suit plots having taken possession and constructed thereon. It seems to me that the Plaintiff was confused on the location of his plots as he was using a map that had since been altered. In the circumstance, I find that the Plaintiff’s plots NO. G520 & G520B, are not the same as plots P5806 and P5807, which now bear the registration number Nairobi/Block 136/2290 and Nairobi/Block 136/2291 respectively. I direct the Plaintiff to proceed to the 2nd Defendant’s office to be shown his rightful plots as explained by DW2. I will hence proceed to uphold the 1st Defendant’s title to the suit plots and find that he is not a trespasser thereon. I further see no reason as to why I should issue orders of rectification of title and mandatory injunction as against the 1st Defendant’s title as sought by the Plaintiff.

It is against the foregoing that I find that the Plaintiff has failed to prove his case on a balance of probability and will proceed to dismiss it. Insofar as costs abide the outcome of the suit, I will award costs to the 1st Defendant only but not the 2nd Defendant as to me it is responsible for the confusion herein.

Dated signed and delivered in open court at Kajjido this 17th day of October, 2019

CHRISTINE OCHIENG

JUDGE